STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 14, 2006
v	No. 258069 Wayne Circuit Court
GIOVANNI RAMARR HECTOR, Defendant-Appellant.	LC No. 04-004346-01

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals his conviction for possession of less than 25 grams of cocaine, MCL 333.7403(2)(A)(5). The trial court sentenced defendant to two years' probation. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

Defendant first argues that the trial court erred when it did not suppress evidence the police obtained during an illegal seizure of defendant as he sat in a parked car. This Court reviews de novo the denial of a motion to suppress evidence but reviews for clear error the factual findings of the court. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). Clear error exists when, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake was made. *Id.*

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11. The lawfulness of a search or seizure depends upon its reasonableness. *People v Orlando*, 305 Mich 686, 690; 9 NW2d 893 (1943); *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). Generally, in the criminal context, a search or seizure conducted without a warrant is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999); *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). The stop-and-frisk exception to the warrant requirement allows a brief, investigatory stop and, during the investigatory stop, seizure of objects found during a search necessitated by a legitimate concern for personal safety. *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868, 1879; 20 L Ed 2d 889 (1968). "The reasonableness of such a search depends on a balancing of the need to search against the intrusion the search entails." *People v Wallin*, 172 Mich App 748, 750; 432 NW2d 427 (1988) citing *Terry, supra*. A search or seizure must be justified at its inception and must be reasonably related in scope to the circumstances which justified the initial interference. *Terry, supra* at 20.

While on duty, Officer Kathy Singleton observed people gathered around two cars parked on the street with loud music playing and an open beer bottle on the roof of the car in which defendant was sitting. Police asked the people to step out of the car. As defendant exited the car, Officer Singleton saw him toss a plastic baggie toward the rear tire. Suspecting the knotted baggie contained narcotics, police arrested defendant. The baggie contained seven grams of cocaine. Defendant did not rebut this testimony at the suppression hearing.

In light of all the circumstances, the officers did not act unreasonably when they detained defendant and recovered the cocaine he attempted to throw away as he exited the vehicle. Our review of the record reveals that the officers had reason to believe they were witnessing noise and open intoxicants ordinance violations. Defendant stresses that the police--who were assigned to the narcotics division--lacked probable cause to investigate because they saw no evidence of unlawful drug activity. Police are not constrained to only investigate their particular detail, and thus, defendant's argument fails.

The police thus did not act unreasonably when they approached the group of people near the music and beer and ordered everyone, including defendant, out of the car. Defendant's momentary detention was lawful. Within seconds he threw away his drugs as he was exiting the car. His action was in plain view of the officer, who had reason to suspect that the knotted plastic bags containing white powder were drugs. The plain-view exception to the warrant requirement allows seizure of objects falling within the plain view of an officer who has a right to be in the position to have that view. *Harris v United States,* 390 US 234, 236; 88 S Ct 992, 993; 19 L Ed 2d 1067 (1968); *People v Tisi,* 384 Mich 214, 218; 180 NW2d 801 (1970). Therefore, because the drugs were in plain view after defendant was lawfully detained, they were admissible as evidence and not subject to suppression.

Defendant next argues that prosecutorial misconduct deprived him of a fair trial. Defendant specifically challenges the prosecutor's statement that the nearby presence of about $500 cash on defendant's brother was evidence of a drug transaction. Because defendant did not timely and specifically object to the prosecutor's alleged improper conduct, the claim of error is unpreserved. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Appellate review of an unpreserved claim of prosecutorial misconduct is for plain error affecting substantial rights. *Id.* at 645. Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* If a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Prosecutorial misconduct is decided on a case by case basis, and the reviewing court must consider the relevant part of the record and examine the prosecutor's remarks in context. *Id.* at 272-273. "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.*

The prosecutor's statement was one isolated comment in a lengthy trial and is not so egregious to warrant reversal from this Court. The trial court instructed the jury regarding what evidence it could consider, and specifically admonished it to not treat the statements of the attorneys as evidence. This Court will presume that a jury followed its instructions. *People v Houston*, 261 Mich App 463, 469-470; 683 NW2d 192 (2004) aff'd 473 Mich 399 (2005). In any event, it is apparent that the jury rejected the prosecutor's characterization of the evidence. Defendant was initially charged with one count of possessing less than 50 grams of cocaine with intent to deliver, MCL 333.7401(2)(1)(iv). By acquitting defendant of possession with intent to deliver and convicting him only for simple possession, the jury found that there was no drug deal. The prosecutor's statement about the money was directed at proving defendant's intent to sell or deliver, not whether he actually possessed drugs. It therefore had no impact on his possession conviction and did not deprive him of a fair trial.

Defendant also argues that the trial court erred when it did not allow him to call a witness who would have testified that the prosecutor coached one of the police officers before the officer testified. This Court reviews for an abuse of discretion a trial court's decision to not allow the late endorsement of a witness. *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance of it. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

The affidavit of defendant's witness stated that the prosecutor told the officer to make sure that she said the drugs were found by the right wheel of the car. Even if true, the affidavit only demonstrates that the prosecutor reminded the officer of her earlier testimony at the preliminary examination. In that testimony, the officer expressly answered affirmatively when defendant's own counsel asked her if she "recovered narcotics from the rear-passenger wheel way [sic] area." The affidavit if believed is thus not evidence of improper coaching and was therefore irrelevant to the case. MRE 402 ("Evidence which is not relevant is not admissible.").

Defendant also argues that the evidence presented at trial was insufficient to prove his guilt beyond a reasonable doubt. When deciding a challenge to the sufficiency of the evidence this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The standard for reviewing a claim of insufficient evidence is deferential and this Court must make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id*. at 400. "The offense of possession of a controlled substance requires proof that defendant had actual or constructive possession of the substance." *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990). "Possession may be established by evidence that defendant exercised control or had the right to exercise control of the substance and knew it was present." *Id.* "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession." *Id.* at 486-487. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The prosecution presented the testimony of three police officers that in varying degrees connected defendant to the recovered drugs. Among them was an officer standing within a few feet of defendant with an unobstructed view of him tossing away plastic bags containing drugs. By drawing attention to inconsistencies in the officers' testimony, defendant improperly asks this Court to interfere with the jury's role of determining the weight of evidence. *See People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). While defendant's witnesses testified that he was innocent, the jury did not believe defendant's witnesses. The prosecution need not disprove all of defendant's theories of the case. *People v Solmonson*, 261 Mich App 657, 662-663; 683 NW2d 761 (2004). Viewed in the light most favorable to the prosecution, the evidence proved beyond a reasonable doubt that defendant was guilty.

Finally, defendant argues that the cumulative effect of the claimed errors requires reversal. This Court cannot consider the cumulative effect of errors when it concludes that no errors occurred. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Because there are no errors to cumulate, defendant was not denied a fair trial due to cumulative error.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio